

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

SHERMAN TRUMELL NESBITT,

Defendant and Appellant.

B217446

(Los Angeles County
Super. Ct. No. YA061924)

APPEAL from a judgment of the Superior Court of Los Angeles County.

James R. Brandlin, Judge. Affirmed.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Keith H. Borjon and A. Scott Hayward, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Sherman Nesbitt was convicted, following a jury trial, of three counts of assault with a firearm in violation of Penal Code section 245, subdivision (a)(2). The jury found true the allegations that appellant personally used a firearm in the commission of the assaults within the meaning of section 12022.5, subdivision (a), inflicted great bodily injury on one of the victims within the meaning of section 12022.7, subdivision (a), served a prior prison term within the meaning of section 667.5, subdivision (b) and suffered a prior serious or violent felony within the meaning of sections 667, subdivisions (b) through (i) and 1170.12 (the "Three Strikes" law). The trial court sentenced appellant to a total term of 22 years and eight months in state prison.

Appellant appealed his conviction and sentence. We upheld the conviction, but remanded for resentencing so that the trial court could exercise its discretion to impose concurrent or consecutive sentences. We indicated that appellant could file a motion to strike his prior conviction under the Three Strikes law. (Case No. B199379.)

On remand, the trial court imposed a concurrent sentence on count 3. The court denied appellant's motion to strike his prior conviction. The trial court sentenced appellant to a total term of 19 years and four months in state prison. Appellant appeals from the trial court's sentence, contending that the trial court abused its discretion in denying his motion to dismiss. We affirm the judgment of conviction.

Facts¹

On May 12, 2005, Freddy Pickett called Tysa Ray a bitch as she walked past him on the way home from school. Ray later told her brother, Casinova Whitsey, about the insult. Whitsey, Ray and three others went to a convenience store that evening looking for Pickett. Whitsey wanted to talk to Pickett about the insult. They did not find Pickett at the store, but encountered him on the way home. Pickett was with a group of five to six people. Whitsey's group walked past Pickett's group.

¹ The facts of the crimes are taken from our prior opinion in this matter, case number B199379.

A short while later, a car pulled up near the group and Pickett and appellant got out. Appellant had a .9 mm handgun at his side. One of the men with Pickett raised a silver stick or pipe, but then put it down. Appellant asked, "Where are you from?" He repeated the question twice. Pickett also asked the group the same question. One of the women in Whitsey's group, Jasmine Scott, approached appellant and said, "You're not gonna shoot none of us." Appellant pushed her and called her a bitch.

Whitsey's group turned and began to walk away. Appellant fired his gun at the group, hitting Whitsey in the ankle and Ray in the thigh and knee. A bullet went through the pants of a third member of the group, James Petties.

Discussion

Appellant contends the trial court abused its discretion in denying his motion to dismiss his 1997 conviction for carjacking.

Rulings on motions to strike prior convictions are reviewed under the deferential abuse of discretion standard. Under that standard an appellant who seeks reversal must demonstrate that the trial court's decision was irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling. (*People v. Carmony* (2004) 33 Cal.4th 367, 373.)

Appellant contends that his prior conviction occurred in 1997, was remote in time and was suffered when he was only seventeen years old. He further contends that he did not commit any violent felonies between 1997 and his current conviction. He contends that the current offenses were committed as a result of an argument and was not related to other criminal behavior. He points out that one of the victims was carrying a metal pipe or stick. He concludes that he falls outside the spirit of the Three Strikes law.

Appellant's prior conviction for carjacking was only eight years old when appellant committed the current offenses in 2005. Appellant suffered three convictions in those intervening eight years, two in 1999 and one in 2002. The 2002 conviction and one

of the 1999 convictions were for being a felon in possession of a gun. While illegal possession of a gun is not itself a violent felony, it has the potential for violence. The fact that appellant persisted in carrying a gun, illegally, does not weigh in his favor. The facts of this case were serious. Appellant shot at three people, narrowly missing one person and hitting two others, one of whom suffered great bodily injury.

Here, the trial court listened to argument from appellant's counsel and the prosecutor, and read the briefs submitted by both sides. The court's comments indicate that it properly considered the nature and circumstances of appellant's current and prior convictions and the particulars of his background, character and prospects, and reached an impartial decision. (*People v. Williams* (1998) 17 Cal.4th 148, 161-164.) Thus, the trial court did not abuse its discretion.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.